In The

Supreme Court of the United States

October Term, 1977

No. 77-1276

HON. LEO OXBERGER,

Petitioner,

vs.

JOHN R. WINEGARD,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

ROBERT G. RILEY, Esquire
GLENN L. SMITH, Esquire
DUNCAN, JONES, RILEY & FINLEY
404 Equitable Building
Des Moines, Iowa 50309

and

GARY G. GERLACH, Esquire
General Counsel
PAUL E. KRITZER, Esquire
Associate General Counsel
DES MOINES REGISTER AND TRIBUNE COMPANY
715 Locust Street
Des Moines, Iowa 50304

Attorneys for Petitioner

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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In the District Court of the State of Iowa
in and for Polk County

Law No. CL8-4250

JOHN R. WINEGARD,

Plaintiff,

vs.

RICHARD A. LARSEN, et al.,

Defendants.

RULING ON MOTION TO COMPEL DISCOVERY

FINDINGS OF FACT

Plaintiff's Motion for Order Compelling Discovery in the Matter of Discovery by deposition of Diane Graham filed March 10, 1975 and Diane Graham's resistance to such motion filed April 1, 1975, final briefs having been received April 25, 1975 and being brought before the Court, the Court finds:

1. That on January 8, 1975 and on January 9, 1975 the Des Moines Register and Tribune published an article written by Diane Graham concerning the dissolution of marriage proceedings between Mr. John R. Winegard and Sally Winegard.

2. An interlocutory appeal to the Supreme Court was denied concerning a ruling of the Des Moines County Court in the dissolution of marriage proceeding finding a common law marriage between the parties.

3. An action was filed in the U. S. District Court, 8th Circuit seeking to have certain Iowa Statutes and Rules of Civil Procedure declared unconstitutional.

4. Diane Graham, in the course of her regular duties as a reporter assigned to check the public files of the federal court in Des Moines, became aware of the contested issues in the Winegard action.

5. Plaintiff, John R. Winegard, is now seeking to depose Diane Graham in regard to the substance of conversations with her sources, one of whom was identified in the article, her notes and memorandums and the editing procedures which produced the articles as a means of discovery in an invasion of privacy and libel suit against the parties who were Diane Graham's sources of information.

CONCLUSIONS OF LAW

This suit on the part of Mr. Winegard and the consequent motion to compel discovery as to Diane Graham, a news reporter gives rise to an issue of which there is no decision from the Supreme Court of Iowa; namely, a party's right in a court action to depose witnesses having knowledge of facts pertaining to his or her cause of action versus the freedom of the press, a right created by the First and Fourteenth Amendments to the Constitution.

We, as a Nation, have always jealously maintained freedom of speech and press. The original thirteen colonies demanded that, before the Constitution be ratified, ten amendments be added thereto, the first one including the proscription that Congress shall make no law respecting an abridgement of free speech and press. Thomas Jefferson stated that should he be made to choose between free government and a free press he would choose the latter because given a free press, a free government could result but a free government cannot exist without a free press. From the passage of the first Alien and Sedition Acts, in the early 19th Century and their revocation, efforts to curb freedom of speech and press have been vigorously resisted and struck down.

However, we have also recognized that such freedoms are not absolute. Congress and the Courts have constantly struggled to balance freedom of the public to know and the right of the individual to privacy. The touchstone of first amendment rights is the promotion of uninhibited discussion of public issues; yet the guarantees for speech and press have never been held to be the sole

preserve of political expression or comment upon public affairs essential to healthy government. In *Time Inc. v. Hill,* 385 U. S. 374 the Court stated "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a society which places a primary value on freedom of speech and press. Courts have always weighted the balancing of interests in any such conflict in favor of the press.

Freedom of the press is chilled when members of the press are subpoenaed for court proceedings to divulge sources of information, the substance of conversations with such sources, or the editing procedures which produced the articles. Citizens are less willing to become the conduit of information to the press. In *Cervantes v. Time,* 464 F. 2d 986, 992 (8th Cir. 1972), the court stated "that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality." Further, in *Baker v. F & F Investment,* 470 F. 2d 778 (2d Cir. 1972), we read "While we recognize that there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms. Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances at the very least in civil cases, in which the public interest in nondisclosure of a journalist's confidential sources outweighs the public and private interest in compelled testi-

mony." *Bursey v. U. S.,* 466 F. 2d 1059 (9th Cir. 1972), extends such freedom from disclosure to identity of persons working on the paper and pamphlets, description of their jobs and details of financing the newspaper.

Case law on government enforcement of subpoenas of newsmen and newswomen suggests certain standards to be used as appropriate tests for safeguarding First Amendment rights of subpoenaed newsmen and newswomen.

In *Bursey v. U. S.,* 466 F. 2d 1059 (9th Cir. 1972), at 1082, 1086 and 1088 the Court said, "All speech, press and associational relationships are presumptively protected by the First Amendment; the burden rests on the [questioner] to establish that the particular expressions or relationships are outside its reach." Further, "Questions about the identity of persons who were responsible for the editorial content and distribution of a newspaper and pamphlets cut deeply into press freedom. Two basic ingredients of press freedom are liberty to decide what to print and to distribute what is printed . . . The fact alone that the Government has a compelling interest in the subject matter of an . . . investigation does not establish that it has any compelling need for the answers to specific questions . . . The government has failed to demonstrate that this line of interrogation bore a substantial connection to the compelling subject matter of the investigation and it has not shown that these destructive means of interrogation were necessary to vindicate its interest in protecting the President or the armed forces." This was a standard set by the Court despite the fact that this was a criminal case where public interest may have greater weight in the balancing test.

Cervantes v. Time, 464 F. 2d 986, 992 (8th Cir. 1972), states that, "absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants." The lower court had sustained the defendant's motion for summary judgment after the plaintiff was unable to obtain certain evidence about the reporter's sources because of the claim to First Amendment protection.

A further standard was set forth in *Baker v. F & F Investment,* 470 F. 2d 778 (2d Cir. 1972), when the court pointed out that the appellants failed to demonstrate that the information was necessary, much less critical to the maintenance of their civil rights action. The Court found contrariwise in *Garland v. Torre,* 259 F. 2d at 550 (2d Cir. 1957), when it held that the infomation sought was critical and went to "the heart of the plaintiff's claim and noted that it was" not dealing with use of the judicial power to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case when the identity of the news source is of doubtful relevance or materiality.

The standard of an alternative source was used in *Democratic National Committee et al. v. McCord,* 356 F. Supp. 1394 (D. C. D. C. 1973). The U. S. District Court for the District of Columbia stated "It may be at some future date the parties will be able to demonstrate to the Court that they are unable to obtain the same information from sources other than Movants, and that they have a compelling and overriding interest in the information sought. Until that time however, the Court will not require Movants to testify at the scheduled depositions or to make any of the requested materials available to the parties."

In light of the above discussion a reporter or publisher under the First Amendment to the Constitution is not subject to court discovery procedures when such discovery is directed to ascertain the confidential sources of information, the substance of conversation with these sources, or the editing procedures which produce the articles unless the party seeking such established by clear and convincing proof that:

1. there exists a critical need for such information in order to maintain a cause of action [or] as a defense to a cause of action.
2. this critical need be of such import to the cause of action or defense that it clearly overrides the strong protections afforded to the First Amendment.
3. all possible alternate sources of the information sought have been exhausted.
4. the information sought is relevant and material to the cause of action or defense involved.

—o—

DECISION

IT IS ORDERED BY THE COURT that Plaintiff's Motion to Compel Discovery in the Matter of Discovery by Deposition of Diane Graham is hereby denied. The Plaintiff has not deposed Stephen Schalk, Richard A. Larsen and Robert C. Bradfield, the defendants.

By agreement of the parties Mr. Winegard's Motion to Compel Discovery and Diane Graham's and Des Moines

Register & Tribune Company's Application under RCP 123 for a protective order were combined and heard jointly.

The Court's ruling today disposes of the issue in the matter involving Mr. Winegard's motion.

The Court retains jurisdiction to make further order if necessary in response to the Application for a Protective Order.

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RULING ON MOTION TO SEQUESTER AND TO STRIKE

The Plaintiff, Mr. John R. Winegard requests the Court to sequester and strike from the file of this proceeding the opinion of Judge Hendrickson and an Application for Interloctory Appeal.

The Plaintiff cites 598.26 Code of Iowa 1975 that forbids certain dissemination of the record and evidence in a dissolution action. This section of the Code also prohibits an "officer or other person" from giving a copy of the testimony or pleading or the substance thereof to any person other than an attorney or party to the action.

Said section applies to the record of the pleadings and evidence. Said section does not prohibit disclosure of the court findings or orders.

Said motion is denied.

/s/ Leo Oxberger

Judge of the Fifth Judicial
District of Iowa